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10
11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA

13
14 **ELIOT SCOTT GRIZZLE,**

Petitioner,

15
16 **v.**

17 **ROBERT HOREL, Warden,**

Respondent.

C 07-4845 SI (PR)

**OPPOSITION TO MOTION FOR
DISCOVERY**

[No Hearing Scheduled]

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19
20 California state prisoner Eliot Scott Grizzle (“Grizzle”) has filed a petition for writ of
21 habeas corpus pursuant to 28 U.S.C. §§ 2241 & 2254. This Court has not ordered respondent to
22 show cause on the petition; respondent has not heretofore entered an appearance. Grizzle has
23 nonetheless moved this Court for an order granting him extensive discovery. The motion is
24 premature and, regardless, fails to establish good cause for the discovery. The motion should be
25 denied.

26 **ARGUMENT**

27 Grizzle asks this Court for leave to conduct extensive discovery, including depositions and
28 the production of documents. Stmt. of Facts and Memo. of P&A in Supp. of Pet.’s Motion (hereafter

1 “Motion”) at 2-3. The request should be rejected.

2 There is “no federal right, constitutional or otherwise, to discovery in habeas proceedings
3 as a general matter.” *Campbell v. Blodgett*, 982 F.2d 1356, 1358 (9th Cir. 1993). Federal habeas
4 discovery is available “if, and to the extent that, the judge in the exercise of his discretion and for
5 good cause shown grants leave to do so, but not otherwise.” Rules Governing Section 2254 Cases,
6 Rule 6. Good cause exists where “specific allegations before the court show reason to believe that
7 the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to
8 relief.” *Bracy v. Gramley*, 520 U.S. 899, 909-10 (1997).

9 Grizzle’s discovery request is premature. This Court has not yet conducted a preliminary
10 review of the petition to determine what, if any, claims are viable and therefore require response by
11 respondent; no order to show cause has issued. *See* Rules Governing Section 2254 Cases, Rule 4.
12 The requirement is not simply procedural, as “good cause” for discovery can only lie relative to a
13 viable claim. *See id.*, Rules 4 & 6; *Bracy v. Gramley*, 520 U.S. at 904, 909-10; *Rich v. Calderon*,
14 187 F.3d 1064, 1068 (9th Cir. 1999); *Matta-Ballesteros v. Henman*, 896 F.2d 255, 259 (7th Cir.
15 1990). The procedural legitimacy of the petition and its claims is likewise a prerequisite to
16 evaluating whether good cause exists for discovery. *See, e.g., United States v. Roane*, 378 F.3d 382,
17 403 (4th Cir. 2004) (discovery properly denied on procedurally defaulted claims); *Calderon v.*
18 *District Court (Roberts)*, 113 F.3d 149 (9th Cir. 1997) (discovery inappropriate where the petition
19 contains unexhausted claims). Not having been ordered to show cause on the petition, respondent
20 has not had the opportunity to address the procedural viability of the petition or its claims, including
21 questions of timeliness, exhaustion, and procedural default.

22 Even assuming, arguendo, Grizzle raises claims substantively and procedurally viable, his
23 request for discovery remains premature. An evaluation of whether good cause exists for discovery
24 should be made after briefing of the merits by the parties and production of the record, i.e., at least
25 after an answer and traverse. *Cf.* Rules Governing Section 2254 Cases, Rule 6 Advisory Committee
26 Notes (observing that “requests for discovery in habeas proceedings normally follow the granting
27 of an evidentiary hearing,” although “there may be some instances in which discovery would be
28 appropriate beforehand”). Only then can this Court determine whether discovery and the costs

1 associated with it are truly necessary to disposition of the petition. Indeed, the Supreme Court has
 2 “made clear that whether a state court’s decision was unreasonable must be assessed in light of the
 3 record the court had before it.” *Holland v. Jackson*, 542 U.S. 649, 652 (2004) (per curiam); *see also*
 4 *Bell v. Cone*, 535 U.S. 685, 697 n.4 (2002) (declining to consider evidence not presented to the state
 5 court). Whether the state court’s decision satisfies 28 U.S.C. § 2254(d) on the record that was before
 6 that court should be determined on the parties’ merits briefs, before any question of discovery is
 7 addressed.^{1/}

8 Last, timing of the request aside, Grizzle fails to show good cause for discovery. Grizzle
 9 does not allege that he made any attempt, successful or not, to procure the requested materials in
 10 state court, or made any attempt to develop the record generally, e.g., by interviewing or seeking
 11 declarations from the witnesses he now seeks to depose.^{2/} Cf. 28 U.S.C. § 2254(e)(2) (evidentiary
 12 hearing not available where applicant failed to develop the basis of claim in state court). On its face,
 13 Grizzle’s motion appears no more than the prohibited proverbial fishing expedition “to investigate
 14 mere speculation.” *Calderon v. District Court (Nicolaus)*, 98 F.3d 1102, 1106 (9th Cir. 1996). The
 15 discovery motion should be denied.

16 CONCLUSION

17 Accordingly, for the reasons stated, respondent respectfully requests that the motion for
 18 discovery be denied.

24
 25 1. Grizzle cannot rejoin that te requested discovery is necessary for the presentation of his
 26 claims: He has already filed his petition, and cannot present new evidence for the first time in his
 traverse.

27 2. A demonstrated effort to procure the requested materials in state court is relevant not only
 28 to good cause for discovery, but also the question of exhaustion. *See Vasquez v. Hillery*, 474 U.S.
 254, 257-58 (1986); *Smith v. Quarterman*, 515 F.3d 392, 403 (5th Cir. 2008).

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2 Respectfully submitted,

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